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NO. 90-1461

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H. Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

versus

South Central Bell Telephone Co.,
Respondent

REPLY TO THE OPPOSITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
AND SUPPLEMENTAL BRIEF

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SUMMARY OF THE ARGUMENT

REPLY BRIEF

* Introduction: As to the Carter/Jackson cases, the Fifth Circuit overlooked the two contracts issues and made fact findings on the issue of Patterson retroactivity. These are matters that should be considered on remand and are not bases for denying certiorari.

1. The Fifth Circuit should have remanded both the two Patterson contracts issues and the issue of retroactivity. It was error for the court to overlook the contracts issues and to decide retroactivity under a blanket rule without "particular" findings. This remand should be made with other issues such as the voluntariness of petitioner's taking VAMAP.

2. There is no further argument.

3. Patterson does not foreclose "fairness" inquiries as to retroactivity. The instant Fifth Circuit blanket rule of non-retroactivity and is unusual and conflicts with its own precedents.

4. There is no further argument.

5. The Fifth Circuit departed from custom and normal procedure by refusing to find a cause of action by substitution in the "noticed" facts. Petitioners would have been better off by not pleading any theory of action. Substitution simply remedies the petitioners' unfortunate timing to have finished trial, appealed, and therefore passed the point of being permitted to amend.

SUPPLEMENTAL BRIEF

* The Seventh Circuit has rejected the "but for" rule which was applied by the Fifth Circuit such that certiorari should be granted.

ARGUMENT

INTRODUCTION

South Central Bell opposes the first four grounds, e.g., the two claimed contracts, for granting certiorari on heavily factual bases, not the considerations of Rule 10. The Fifth Circuit overlooked the issue whether two agreements were Patterson contracts and decided the case on other grounds. However, this Court is not the forum to determine if the two agreements are Patterson contracts or, for that matter, to determine numerous other factual issues. Instead the contracts issue should be remanded to the trial court which has never had an opportunity to make a finding. Moreover, as was argued to the Fifth Circuit, the entire initial Carter/Jackson matter (along with the later developed Patterson contracts and retroactivity issues) should be remanded (as was done with the Allen matter) for an explanation under rule 52a, FRCP. However, for the sake of caution, petitioners will make a factual reply.

1. The argument that either or both petitioners knew that by signing the VAMAP agreement they intended to resign or knew that they were resigning was not reached by the Fifth Circuit. Moreover, the trial court judgment of voluntariness was not based on either of the evidentiary items (the incomplete, rough draft letter of Carter alone, not Jackson, and the testimony of Carter's husband, not Jackson's) cited by South Central Bell. The trial court did not even mention these two (2) items. Obviously it did not base its finding on them.

There is abundant evidence that petitioners would never have signed the VAMAP contract without: (1) the repeated misrepresentations of their immediate supervisor (Massett) that the VAMAP quota (13 or 14) was already full when they signed and (2) the supervisor's admittedly supplying petitioners the names of other employees whom he specifically misrepresented as filling the quota. However, although recited by the trial court, this (and other) "inducement" evidence was not evaluated by the trial court for its affect on the petitioners' thinking about "voluntarily" taking VAMAP.

Furthermore, the issue whether the 1984 VAMAP "form" is a contract was also not considered or determined by the fact finder. Obviously, the court did not reach the issue whether the "form" was a Patterson contract. By its very terms, it was an "offer" and no one who signed it was "turned down". South Central Bell cannot have it both ways: the VAMAP document can not be both a mere solicitation (as South Central Bell argued through the appellate level) and a contract, the effect of which was known to petitioners. Further, the so-called "form" was one of several contract choices in a layoff package and was no less a contract than the others. Finally, it varies significantly from the 1985 "form" in that the later version omits entirely the word "offer".

As to the issue whether the "form" was discriminatorily aimed at petitioners, defendant fails to advise this Court that: everybody in petitioners' work group, Westbank Engineering, who took VAMAP was black; that, in fact, the only employees who took VAMAP were petitioners themselves; and that unless both took VAMAP, Johansen would be the first to be laid off according to inverse seniority under another program.

Furthermore, the threshold issues of the closed meeting and secret job protection agreement were recited, but not evaluated by the trial court either with respect to discriminatory animus or to their corresponding effect on petitioners' voluntariness. Again (to argue facts that should be found by the trial court on remand),

the evidence showed that Johansen went into the meeting very apprehensive about losing her job, but immediately afterward quit worrying and started buying new clothes. Even before petitioners knew that they had been "accepted" for VAMAP, Johansen knew of the acceptance and she knew the consequences: she admittedly thanked Jackson for "saving her job". (The petition was in error in stating that Johansen admittedly thanked Carter.) The trial court neither drew nor declined to draw an inference of a secret VAMAP deal from: (a) the closed meeting; (b) Johansen's radically changed behavior; (c) the supervisor's admitted "full quota" (mis)representations to petitioners and (d) Johansen's admitted (and advance) thank-you to Jackson. As with the VAMAP "forms" there was no finding as to whether the closed meeting resulted in an agreement and, just as obviously, none as to its qualification as a Patterson contact.

Accordingly, the fact-finding issues of an inferred secret job protection agreement, the contractual nature of the 1984 "form" (especially in light of the 1985 VAMAP "form"), and the voluntariness of the VAMAP agreements of both Carter and Jackson, individually and separately, should be remanded to the trial court (as was argued to the Fifth Circuit).

Last, but not least, the questions still remain whether one or both of the claimed contracts qualify as actionable exceptions to Patterson under sec. 1981 and, if so, the effect on the issue of employer deception versus employee(s) knowledge. The issue whether these agreements should be characterized as Patterson contracts should also be remanded. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991), Rubin, Circuit Judge, sitting by designation); Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82, 88 (5th Cir. 1989) (characterization of an agreement is a fact issue).

As to how the Patterson contract(s) issue should be decided, there seems to be a lack of authority after Patterson in support of either side,

Answering that question for the petitioners does not require a broad interpretation of a Patterson contract: All that is necessary - whether the contract is made before or during employment - is that it signal a new and distinct employer/employee relation. It is far too facile to say that the secret agreement was merely an assurance of continued employment in the same position. Certainly there was no promotion or even a change of position involved, but obviously this secret agreement "involve(d) the right to make a contract" and did merely not "implicate the performance of established contract obligations and the conditions of continuing employment...." (emph. added).

Counsel for South Central Bell misplaces his emphasis on a "change in position." Rather, the emphasis of Patterson is on a new and distinct employer/employee relation that can be found without a new position. If petitioners had been included in the secret agreement, they would have had job security - protection from the impending layoff - that no one else had. A distinct relation is one that is clearly not the same. (Black's Law Dictionary, 5th ed., p. 425.) It is hard to imagine a newer and more distinct relation with one's employer.

Finally, this "closed meeting" deal had nothing to do with the performance of the existing contract nor with "continuing" employment. In fact, it concerned a brand new arrangement and petitioners' "terminating" employment.

Therefore, the petition should be granted and the Patterson contracts issued be remanded.

2. As to whether Patterson applies to retaliatory discharge, no further argument is necessary.

3. An additional reason for remand is that even if the agreements are found not to be Patterson contracts, the Carter/Jackson sec. 1981 complaints might still be saved if the trial court finds that it is not fair to apply Patterson retroactively. The Fifth Circuit made the fact determinations that petitioners and Ms. Patterson

were similarly situated, that petitioners would have a difficult time showing hardship/unfairness, and that accordingly Patterson should apply retroactively. Because Patterson was not decided until after trial, the facts as to fairness were of course not developed or decided at trial. For this reason the issue of retroactivity should be remanded.

South Central Bell also argues that such a "fairness" inquiry would require a case-by-case analysis as to the reasons why a suit was filed under sec. 1981, not Title VII. Counsel also seems to suggest that this Court held that a "motive" inquiry was foreclosed and that no explanation (even of a benign motive) would ever excuse filing a complaint under sec. 1981. It does not appear that Patterson intended this result. Instead, it seems that this Court in that "particular case" wanted only to avoid a "tortuous" construction of sec. 1981. Patterson, supra, 109 S.Ct. 2375. Under the reasoning of counsel (see Opposition, p. 9) and the Fifth Circuit, all sec. 1981 claims would be automatically dismissed retroactively and no "fairness" inquiry could ever be made. This is not the usual Fifth Circuit rule. (Appendix, pp. A-11 et. seq.)

However, a case-by-case inquiry is the usual procedure and it was error for the Fifth Circuit effectively to create a rule of blanket retroactivity, particularly where no inquiry has been made if "tortuous" construction of sec. 1981 is required to cover the instant complaints. Accordingly, the petition should be granted.

Regardless, no such "motive" inquiry is required here where it can be shown that petitioners had fully complied with Title VII and that their sec. 1981 action was also timely as to Title VII. Compliance and timeliness create an identity between the sec. 1981 and Title VII actions that avoids any inquiry into motives and creates only the narrowest exception to Patterson retroactivity, that exceptional class of cases being those where Title VII procedures and timeliness were fully met. For the same reasons

as urged above, the petition should be granted.

(Additionally, should petitioners' contract and nonretroactivity arguments fail, this identity points to the court's duty (and the ease with which it may be fulfilled) to find a cause of action in the facts of the "notice" complaints.)
Furthermore, as will be argued below, due to the "luck" of timing, petitioners, as opposed to later litigants, have lost the usual right to amend and this inopportune scheduling supplies an additional reason for non-retroactivity.

Finally, because the Patterson contracts and retroactivity issues are closely connected fact issues (if the first argument fails, the second might succeed), this Court should grant certiorari and both should be remanded.

4. As to whether Patterson can fairly be applied to Allen's retaliatory discharge, petitioners continue to be of the opinion that this is a fact issue that should be remanded to the trial court. Counsel suggests a blanket retroactivity rule, but this is not the law.

5. "A rose is a rose by any other name".

South Central Bell argues that in refusing to scrutinize the Carter/Jackson complaints the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings because it had no such duty and, further, that there was no abrogation of the usual right to amend.

Preliminarily, petitioners are now in the strange situation of being in a worse position than if they had pled no theory of action whatsoever. Had they pled none, there would be no question of substitution and the usual judicial duty might appear more clearly. Moreover, the fact that this is a civil rights matter does not require a special rule either for or against substitution. The usual rule in all Circuits which seem to have considered the issue is set out in the Petition (pp. 13 et seq.).

Furthermore, petitioners have had the misfortune already to have tried and appealed their cases when Patterson was decided and therefore to have passed the normal opportunities to amend. Because of the luck of timing, they have lost this normal right. Substitution simply remedies this misfortune.

SUPPLEMENTAL BRIEF

In discharging Allen, the Fifth Circuit found that South Central Bell had acted partly out of a retaliatory motive, but offered it the opportunity to show that it would have made the same decision anyway for a proper motive. (Appendix, pp. A-21 et seq.) As authority for this "but for" holding it cited the "plurality" opinion of this Court in Price Waterhouse v. Hopkins, U.S. _____, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268 (1989) and then quoted the concurring opinion of Justice O'Connor. The Fifth Circuit also cited Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed2d 471 (1977); Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985).

However, as appears from McCarny v. Kemper Life Ins. Companies, 924 F.2d 683 (7th Cir. 1991) n.1 (decided February 6, 1991, received in slip form April 1, 1991), the plurality opinion in Price Waterhouse is that the defendant is not entitled to an opportunity to show that it would have fired the plaintiff for the "good" reason. That is, once the plaintiff shows that the defendant had acted out of a bad motive, plaintiff wins.

Accordingly, there is now a conflict between the Fifth and Seventh Circuits such that this Court should grant certiorari on this issue.

CONCLUSION

This Court should grant certiorari on all issues, both original and supplemental.

Respectfully submitted,

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